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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR AGUILAR SANTOYO,

Defendant and Appellant.

C069682

(Super. Ct. No. 10F07563)

Defendant Salvador Aguilar Santoyo promised to take 13-year-old T. to a school open house so she could earn extra credit, but then he detoured to an apartment where he molested her. A jury found him guilty of two lewd acts on a child (thereby acquitting or failing to reach a verdict on the more serious charges of rape, forcible sodomy, and forcible lewd acts), and the court sentenced him to 17 years in prison.

On appeal, defendant raises four issues relating to the evidence and sentencing. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Defendant, who was in his 20's, was a family friend of T. One evening when T.'s mother could not take T. to school for an extra credit project, defendant said he would. Instead of taking T. to her school, he took her to his girlfriend's apartment, which was vacant. He showed her a gun. They then went in a bedroom, where defendant asked T., "'What would you do if I take you down?'" T. interpreted this to mean "'What would you do if I had sex with you?'"

Defendant then kissed T., pulled her pants down, and pushed her on the bed, where he stuck his penis through one of the leg openings of her underwear. He then stuck his penis in her vagina. T. pulled up her pants. Right after that, defendant used his hand to touch her vagina on the outside of her clothing. Defendant went to the bathroom, and T. went outside. When defendant joined her, T. told him to take her home, and he did.

Defendant testified at trial that he did not molest T.

## DISCUSSION

### I

*The Court Did Not Abuse Its Discretion In Refusing To Admit Certain Defense Evidence, And Trial Counsel Was Not Ineffective*

Defendant contends the court abused its discretion when it refused to admit under Evidence Code section 356 portions of an interview he had with police. There was no error, and defense counsel was not ineffective for failing to turn this evidentiary

issue into an alleged constitutional issue, as defendant further claims.

A

*The Law*

Evidence Code section 356 states, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

B

*The Proffered Evidence And The Trial Court's Ruling*

The People wanted to introduce the following three statements defendant made to police:

(1) "'[T.] is like a little sister to me. I would never touch her sexually.'"

(2) "'I would never do this. It is against everything I believe in.'"

(3) "'I never had sex with [T.]'"

Defendant then sought to introduce the following five statements to "give completeness" to the People's three proffered statements:

(1) "'[T.]'s family has a lot of problems. Her mom, . . . , is a "crazy crack head.'"

(2) "'[T.]'s dad molested [T.]'"

(3) "'That family has serious issues, and someone is making false allegations against me.'"

(4) "'[T.] called me today and said that she ran away from home because she hates her mom and because she thought she was pregnant. I don't know who got her pregnant. [T.] had sex with someone, I guess. I never had sex with [T.] [T.] said that when she ran away from home, a guy tried to rape her at Woodbine Park. That was when she stole her mother's meth and ran away from home, and then got arrested for possession of meth.'"

(5) "'I thought you guys were chasing me today because of some drugs my girl got arrested with a few weeks ago. I had no idea about any sex-crime accusations.'"

The court admitted the three statements the People wanted in, but it excluded the five offered by defendant because they "do not make [defendant's] unequivocal denials [offered in the People's three statements] any more complete."

C

*The Court Did Not Abuse Its Discretion*

*In Excluding The Defense Evidence,*

*And Counsel Was Not Ineffective*

"By its terms section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject*, and (2) it is necessary to make the already introduced conversation *understood*." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192-193.)

The defense evidence here failed on both points. One, the defense evidence did not relate to the same subject as the three

statements introduced by the People, which were denials of defendant's guilt. Rather, the defense evidence dealt with T.'s family problems, defendant's girlfriend's drug issues, and T.'s father's molestation of her. And two, the statements introduced by the People were straightforward, unequivocal denials, and the jury did not need any further statements to inform their meaning. The court properly excluded the defense evidence.

To the extent defendant now claims the exclusion of this evidence violated his federal right to present a defense, this issue was not raised in the trial court, and defense counsel was not ineffective for failing to so argue, as defendant now claims on appeal. Defense counsel could have reasonably concluded that further pressing for the admission of this evidence could backfire with the jury. Placing the blame on the victim's family, and drawing attention to their drug use or that of defendant's girlfriend were all unsavory topics and off point, and defense counsel might well have decided that he could prevail on at trial without this messy evidence. To a large extent, he would have been correct, as the jury acquitted defendant or could not reach verdicts on the more serious charges.

## II

### *The Court Did Not Abuse Its Discretion In Finding No Discoverable Evidence In T.'s Confidential School Records*

Defendant sought T.'s confidential school records to assist in his defense. The court reviewed those records in camera, found nothing discoverable, sealed those records, and then

placed them in the court file. Defendant now requests that we review the sealed records to determine whether the trial court abused its discretion by ruling that the records produced no discoverable material. (*People v. Gill* (1997) 60 Cal.App.4th 743, 749 [abuse of discretion standard].) We have reviewed the in camera proceedings (*People v. Mooc* (2001) 26 Cal.4th 1216, 1232) and conclude that the records contain no discoverable material. There was no abuse of discretion

### III

#### *The Court Was Correct In Not Staying The Punishment On One Of The Two Lewd Act Counts*

The court imposed concurrent sentences on the two lewd act counts. Defendant contends the court should have imposed a stay on the punishment of one of the lewd act counts because the crimes were part of an indivisible course of conduct. He is wrong.

"A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*People v. Perez* (1979) 23 Cal.3d 545, 553.) Relying on *Perez*, the Supreme Court has rejected an argument similar to the one defendant makes here that simply because a defendant committed a number of sexual acts in a very short time, those acts all occurred as a part of an indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335-338.)

Here, the same is true, where there were clearly two distinct lewd acts. One occurred after defendant kissed her,

pulled her pants down, and pushed her on the bed, when he stuck his penis through one of the leg openings in her underwear and stuck his penis in her vagina. This act ended when T. pulled up her pants. Then, the second act occurred, right after that when defendant used his hand to touch her vagina on the outside of her clothing. Pursuant to the Supreme Court's decision in *People v. Harrison, supra*, 48 Cal.3d at pages 335-338, we reject defendant's argument.

#### IV

##### *The Court Did Not Abuse Its Discretion*

##### *In Refusing To Strike Defendant's Prior Conviction*

Defendant's sentence included a doubling of his punishment for committing the lewd acts because the court found defendant had a prior conviction that qualified as a strike. Defendant contends the trial court abused its discretion in refusing to strike his prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. There was no abuse. (See *People v. Williams* (1998) 17 Cal.4th 148, 162 [standard of review].)

The court identified numerous appropriate reasons for not striking the prior conviction. (See Rules of Court, rule 4.421 [listing circumstances in aggravation].) These included defendant's long criminal record that progressively got more serious, his status as a parolee when his current crimes were committed, and the facts of the current crime, namely, that defendant selected a vulnerable young teenage victim, he took advantage of a position of trust with her, he planned the

molest, and he displayed a handgun. These reasons adequately supported the trial court's exercise of discretion.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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RAYE, P. J.

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BLEASE, J.